83 - 1533

Docket No. _____

IN THE

Supreme Court of the United States

October Term 1983

PHILLIP WAYNE TOMLIN,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, his conviction for capital murder thus being an unconstitutional denial of his right to due process, and entitling the said Petitioner to a new trial.

A. Whether the Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and denied due process of law, by the ex post facto determination of the Alabama Supreme Court that an alibi defense would conclusively preclude the Defendant from invoking or proffering evidence of, and obtaining jury instructions, on a lesser included offense in a new trial.

B. Whether the Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and denied due process of law, insofar as the State of Alabama failed to prove beyond a reasonable doubt the requisite aggravating elements of capital murder, the jury was precluded from finding the Petitioner guilty of a lesser included offense, and the jury was also precluded from considering aggravating and mitigating circumstances in a bifurcated hearing.

II. Whether the Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and his conviction for capital murder was an unconstitutional denial of equal protection under the law.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, Phillip Wayne Tomlin, by and through his attorneys of record, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama, which judgment was entered on rehearing on or about December 9, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Alabama, on rehearing, is attached hereto in the appendix as Exhibit A. The opinion of the Alabama Court of Criminal Appeals can be found at 443 So. 2d 47 (Ala. Crim. App. 1979)

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC §1257(3),

Petitioner having asserted below and asserting herein the deprivation of rights secured by the Constitution of the United States. The judgment sought to be reviewed was rendered by the Alabama Supreme Court, on rehearing, on December 9, 1983, and is attached hereto in the appendix as Exhibit A.

The Petitioner timely filed this petition for Writ of Certiorari on or about the 7th day of February, 1984; however, due to technical deficiencies in format and type-size of the appendix, the said petition was returned to counsel for the Petitioner, with leave to amend the same and refile for docketing.

The amended version of this petition for Writ of Certiorari has been timely refiled in compliance with the directions of the Clerk of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Alabama law: Code of Alabama, 1975, §13-11-2(a)(7) and (10).

> "If the jury finds the Defendant guilty, it shall fix the punishment at death when the Defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include lesser offenses...
>
> (7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;...
>
> (10) Murder in the first degree wherein two or more human beings are intentionally killed by the Defendant by one or a series of acts;..."

STATEMENT OF THE CASE

The Petitioner, Phillip Wayne Tomlin, was indicted by the Grand Jury of Mobile County, Alabama on September 22, 1977 for capital murder as defined in Code of Alabama (1975), 13-11-2(a)(7) and (10). On October, 13, 1977 the Petitioner was arraigned, and pleaded not guilty to the charges in the indictment. (R. pp. 1,2)

On March 20, 1978, a jury was struck by the parties, and empaneled, whereupon a trial began and continued. The State of Alabama produced no eyewitnesses nor any witnesses who could otherwise place the Petitioner at the actual scene of the crime. Instead, the prosecution relied solely on the basis of circumstantial evidence to get a jury to convict the Petitioner, and mandatorily sentence him to death without benefit of a bifurcated

hearing before the said jury on the issue of aggravating and mitigating circumstances. At the close of the State's evidence, the Petitioner filed a written Motion to Exclude and a Judgment of Acquittal and the said motions were denied. (R. pp. 26-31, 161-165)

The Petitioner, Phillip Wayne Tomlin, acting by and through his attorneys, and believing that under the preclusion clause in the statute it would be both a dangerous risk and fruitless in any event to produce evidence of lesser included offenses such as first degree murder and/or second degree murder, then presented an alibi defense in rebuttal to the State's circumstantial case against him.

After the giving of plainly inadequate, if not erroneous instructions and reinstructions to the jury, which were excepted to by defense counsel, on

Saturday, March 25, 1978, the jury returned a verdict of guilty. (R. p. 33) (R. 973, 974, 979, 982-987)

On the 21st day of April, 1978, the Petitioner filed a motion for a new trial and on May 26, 1978 the said motion was denied. (R. pp. 39-174)

Thereafter, on December 8, 1978, the court held a hearing ostensibly to consider aggravating and mitigating circumstances, sustained the verdict of the jury, and sentenced the Petitioner, Phillip Wayne Tomlin, to death. (R. pp. 175-179) Appeal was taken to the Court of Criminal Appeals of Alabama which affirmed the conviction, but remanded the case to the trial court for a new sentencing hearing to reevaluate aggravating and mitigating circumstances, and redetermine the Petitioner's sentence.

After Petitioner's application for rehearing and Rule 39(k) Motion were

denied by the Alabama Court of Criminal Appeals, a petition for writ of certiorari was then timely filed before the Supreme Court of Alabama, and granted.

On July 31, 1980 the Petitioner filed a motion in the Supreme Court of Alabama to reverse his conviction, in part on the basis of the United States Supreme Court's decision in Beck v. Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 392 (1980).

On August 28, 1981, the Supreme Court of Alabama reversed the conviction and ordered a new trial for the Petitioner, Phillip Wayne Tomlin. Thereafter, the State of Alabama filed an application for rehearing before the Alabama Supreme Court, contending that the decision of the United States Supreme Court in Hopper v. Evans, 456 US 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982) precluded the Petitioner's right to a new trial.

On December 9, 1983, the Alabama Supreme Court granted the application for rehearing, withdrew its opinion of August 28, 1981 ordering a new trial, and affirmed the conviction of the Petitioner for capital murder, and remanded the case back to the trial court for resentencing. This case is now pending before the United States Supreme Court on petition for certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his Petition for Writ of Certiorari, before the Supreme Court of Alabama, and motions and briefs filed in support of the said Petition for Certiorari and also filed in opposition to the State of Alabama's application for rehearing, the Petitioner contended that he was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and his conviction for capital murder was an unconstitutional denial of his right to due process of law under the United States Constitution.

The Petitioner, Phillip Wayne Tomlin, also necessarily raised the issue in his briefs in opposition to the State of Alabama's application for rehearing, that for the Alabama Supreme Court to impose, ex post facto, a new unforeseeable rule of law, to-wit,

that defendants who had raised an alibi defense under Alabama's 1975 death penalty statute could not under any circumstances claim prejudice, deprived the Petitioner, and a class of unwary capital murder defendants and their respective attorneys, of their constitutional right to due process, effective assistance of counsel, and equal protection under the law.

The Supreme Court of Alabama, on rehearing, issued an opinion rejecting all of the contentions raised by the Petitioner. The Alabama Supreme Court both failed to directly address and summarily disposed of these constitutional infirmities by misguided reliance upon a precedent and new, unforeseeable rule of law it had established in the aftermath of Hopper v. Evans, 456 US 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); to-wit, in the case of Cook v. State, 431 So. 2d 1322 (Ala. 1983).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION OF THE ALABAMA SUPREME COURT ON REHEARING IN THE CASE AT BAR, AND THIS PETITION FOR WRIT OF CERTIORARI, RAISES SIGNIFICANT CONSTITUTIONAL ISSUES OF FIRST IMPRESSION, AND COMPELLING PUBLIC POLICY CONSIDERATIONS, BEFORE THE UNITED STATES SUPREME COURT.

A. Petitioner, Phillip Wayne Tomlin, has been deprived of due process of law, effective assistance of counsel, and equal protection under the law by the ex post facto determination of the Alabama Supreme Court that an alibi defense raised under Alabama's 1975 death penalty statute, which statute was declared by the United States Supreme Court to be unconstitutional in Beck v. State of Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), would conclusively preclude any claim by

the Petitioner that different trial tactics and strategy could and would have been employed, evidence was and could have been invoked and/or introduced, and jury instructions obtained, that establish that Petitioner was guilty of no more than a lesser included offense. The question of whether a defendant, charged with capital murder under Alabama's 1975 death penalty statute, to-wit, Alabama Code (1975), §13-11-2, et seq., and unwary of a new and unforeseeable rule of law which would evolve from appellate decisions handed down long after the trial of the Petitioner for capital murder, is prejudiced thereby, is a significant constitutional issue compelling consideration by the United States Supreme Court.

In order to fully understand the constitutional violations suffered by the Petitioner, Phillip Wayne Tomlin, it is

imperative to understand the perspective of counsel for the Petitioner at the time of trial in 1978. The Alabama Supreme Court, in epitomizing the constitutional defects in Alabama's 1975 death penalty statute, clearly identified how limited the options were for a Defendant charged with capital murder under the then existing law of Alabama, when it held:

> "A majority of this court, however, also recognized that the death penalty statute applicable to Beck, because of its preclusion clause, did not allow jury instructions on lesser included offenses. Hence, any offer of evidence thereof, or any plea based thereon would have been irrelevant and impermissible at trial under that statute. Accordingly, the cases of persons tried and convicted under Code of 1975, §13-11-1 to 9, as construed in Beck v. State, supra, have been remanded for new trials on the merits in order to afford them the opportunity to proffer evidence of lesser included offenses. Beck v. Alabama, supra, Beck v. State, supra.

> That result, of course, represents adherence to, not departure from, the rule requiring the jury instruction on lesser included offenses when such a charge is warranted by evidence." (Emphasis added) Ex Parte Reed, 407 So. 2d 152, 163 (Ala. 1981)

The Petitioner herein, Phillip Wayne Tomlin would respectfully submit that the operation of the preclusion clause in the death penalty statute under which he was convicted inherently dictated the trial tactics and strategy adopted and pursued by the Petitioner and his attorneys. As the Alabama Supreme Court expressly recognized in the Reed case, supra, and the United States Supreme Court held in the case of Beck v. State of Alabama, supra, not only would 'the offer of evidence and jury instructions on a lesser-included offense have been irrelevant and impermissible at trial under that statute'; but a defendant charged with capital

murder, who actively sought to introduce evidence of guilt of a lesser-included offense, faced the risk, indeed the realization, that if a capital jury found the defendant guilty of any killing, that jury would then be required by law to choose between acquitting the defendant of everything, or else convicting the defendant of capital murder, and ipso facto sentencing that defendant to die by electrocution.

Certainly, had counsel for the Petitioner been able to see into the future, and read into the minds of the Justices who now sit on the United States Supreme Court and Alabama Supreme Court respectively, trial tactics and strategies regarding whether or not to put Petitioner on the stand to testify to an alibi, and/or decisions regarding the scope and emphasis on the cross-examination of key witnesses for the prosecution would have

been significantly affected. The crux of the problem is essentially that the Petitioner, by being bound by a new and unforeseeable rule of law regarding the impact of his taking the stand and raising the defense of alibi, has been deprived of due process of law, and effective assistance of counsel. The plain and unassailable fact of the matter is that neither the Petitioner nor his attorney purports to be a fortune teller with the ability to predict what standards and rules of law may or may not evolve in the future. Rather, Petitioner and his counsel undertook to try the capital murder case under the then existing applicable rules of law, and really had no choice but to do so. Clearly to now impose upon the Petitioner, who was charged with capital murder under Alabama's 1975 death penalty statute, a new and unforeseeable rule of law, to-wit,

the ex post facto determination by the Alabama Supreme Court that an alibi defense would conclusively preclude any claim of prejudice the Petitioner suffered vis-a-via the preclusion clause in the statute, deprives the said Petitioner of due process of law, effective assistance of counsel and equal protection under the law.

It has been held that in measuring whether a defendant has been afforded effective assistance of counsel, "the test in the criminal case is one of fundamental due process, and the remedy for the failure to provide that is to afford the defendant a new trial.2" Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983); see also Washington v. Strickland, 693 F. 2d 1243, (11th Cir. 1982). While the case at bar does not fit within

the usual context of previous court opinions regarding failure to receive effective assistance of counsel, the issue is nevertheless clearly raised herein and impacts upon the Petitioner's fundamental right to due process and equal protection under the law. It is a significant constitutional issue of first impression, and involves compelling public policy considerations sure to arise in other cases to be decided by the court regarding the unfairness of imposing, ex post facto, a new and unforeseeable rule of law upon a defendant and his counsel in a capital murder case.

II. THE DECISION OF THE ALABAMA SUPREME COURT ON REHEARING IN THE CASE AT BAR IS MISGUIDED AND CONTRARY TO THE DECISION OF THE UNITED STATES SUPREME COURT IN BECK V. STATE OF ALABAMA AND HOPPER V. EVANS.

A. The United States Supreme Court in the landmark decision of Beck v. State

of Alabama, 447 US 625, 100 S. Ct. 3382, 65 L. Ed. 2d 392 (1980) held:

> "Alabama failure to afford capital defendants the protection provided by lesser-included offense instructions is unique in American criminal law.[10] ... [T]he nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the 'third option' of convicting on a lesser-included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake...
>
> To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we

> have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.[13] The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser-included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.[14]" (Emphasis added) (Citations omitted) Id. at 65 L. Ed. 2d 401, 402, 403.

Thus, the Beck decision, supra, served to strike down as unconstitutional a provision of the Alabama statute on capital murder, which statute, to-wit, Code of Alabama (1975), §13-11-2, et seq., is the same statute under which the instant Petitioner, Phillip Wayne Tomlin, was tried, convicted, and sentenced to die in the electric chair.

The Supreme Court of Alabama ostensibly relying upon this Court's decision in the case of Hopper v. Evans, 456 US 605, 102

Sp. Ct. 2049, 72 L. Ed. 2d 367 (1982), has ruled that application of the Alabama preclusion law whereby a jury was required to decide guilt or innocence of a capital crime without consideration of lesser-included non-capital offenses was not prejudicial to the Petitioner, Phillip Wayne Tomlin, and that the said Petitioner was not therefore entitled to a new trial. The reliance of the Alabama Supreme Court on Hopper v. Evans, supra, is misguided. First, it should be noted that the State of Alabama has heretofore conceded at all stages of the appellate process that the case at bar is clearly distinguishable from the facts in Hopper v. Evans, supra. On that unique and peculiar state of facts, this Supreme Court concluded:

> "It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon engaged in an armed robbery,

> admits to shooting his victim in the back in the circumstances shown here. The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was therefore not warranted." (Emphasis added) Id. at 72 L. Ed. 2d 374.

The court went on to admonish in a footnote, however:

> "In another case with different facts, a defendant might make a plausible claim that he would have employed different trial tactics-for example, that he would have introduced certain evidence or requested certain jury instructions-but for the preclusion clause.

The Petitioner, Phillip Wayne Tomlin, would respectively submit that the case at bar is just the sort of case with different facts which the United States Supreme Court alluded to in the Hopper v. Evans, case, supra. The evidence of record in the case at bar does not conclusively or absolutely

negate the possiblity that the Petitioner, Phillip Wayne Tomlin, never intended a double homocide. Indeed, there was absolutely no evidence that the Petitioner was the trigger man or even present at the time that the two victims were killed. The co-defendant, John Ronald Daniels, might have killed both victims, one of whom the Petitioner never had any intent whatsoever to kill. To prove that Phillip Wayne Tomlin was guilty of capital murder, it was the State of Alabama's burden to prove that the said Petitioner had the "particularized intent" to deliberately kill two or more human beings. Beck v. Alabama, 447 US 625-628, n. 2 (1980); see also Ex Parte Raines 429 So. 2d 1111, 1112-13 (Ala. 1982). Significantly, in the Beck case, supra, the United States Supreme Court made clear that a defendant need not rely solely on his own evidence in order to justify jury instructions on a lesser-included offense,

but has a right, after all the evidence is in, to invoke whatever holes or doubts exist in the State's case to justify such jury instructions. Beck v. State of Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, 402-403 (1980).

Moreover, there was evidence that the Petitioner was quite distraught over his brother's death, who had been shot and killed by one of the victims, to-wit, Richard Brune, and that the Petitioner, his deceased brother, and the homocide victim Richard Brune, were all involved in abuse of drugs and alcohol, etc. (R. pp. 232, 238, 271-295, 785) (R. pp. 827-830, 835, 846-848, 850 8-18) (R. pp. 921, 1027-1029) The Petitioner would submit that the evidence of record from the first trial would not preclude or affirmatively negate the Petitioner on a new trial from employing new trial tactics and strategy in an effort to convince the jury, for example,that

the Petitioner's mental state at the time of the double homocide was sufficiently poisoned by the drugs, alcohol and grief over his brother's death such that the requisite intent to commit a capital homocide could not be found to exist. When the evidence of record is examined in light of the fact that under the then existing law of Alabama a capital murder defendant had no option of pursuing evidence and/or jury instructions of a lesser-included offense, the prejudice is undeniable. The preclusion clause in this case clearly dictated the trial strategy and tactics adopted by the Petitioner and his attorney, and its operation served to severely prejudice the Petitioner's right to a fair trial; wherein a defendant charged with capital murder can present a defense, including evidence of guilt of a lesser-included offense, without fear that if a capital jury finds a defendant guilty of

any killing, that jury will be required by law to choose between acquitting the defendant of everything or sentencing that defendant to death in the electric chair. It is patently unfair for the Courts to now impose a new and unforeseeable rule of law upon the Petitioner, to-wit, the ex post facto determination of the Alabama Supreme Court that an alibi defense would conclusively preclude the defendant from invoking or introducing evidence of, and obtaining jury instructions on, a lesser-included offense in a new trial. It transgresses the intent of the United States Supreme Court which was enunciated in Beck v. State of Alabama, supra and Hopper v. Evans, supra, and effectively denies the Petitioner his fundamental constitutional right to due process of law.

The decision of the Alabama Supreme

Court in the case at bar is violative of constitutional rights of the Petitioner insofar as the decision fails to follow the dictates of the United States Supreme Court which were expressed in Godfrey v. Georgia, 446 US 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Not only has the jury been effectively eliminated from considering aggravating and mitigating circumstances prior to sentencing the defendant, which was held to be constitutionally mandated, in Beck v. State, 396 So. 2d 645, 660-662 (Ala. 1980), but the State of Alabama otherwise failed to prove the alleged aggravating circumstances beyond a reasonable doubt. (R. pp. 174, 175-179, 982-988, 1003-1032)

CONCLUSION

WHEREFORE, the premises considered, the Petitioner, Phillip Wayne Tomlin, respectfully moves this Court to grant his Petition for Writ of Certiorari to the Alabama Supreme Court.

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CERTIFICATE OF SERVICE

I, Richard D. Horne, a member of the bar of the U.S. Supreme Court and Attorney for the Petitioner, do hereby certify that on the 7th day of February and again on the 14th day of March, 1984, I did serve the requisite number of copies of the foregoing to the Clerk of the Supreme Court and the Attorney General for the State of Alabama, Charles Graddick, by placing a copy of same in the United States Mail, properly addressed and first class postage prepaid.

RICHARD D. HORNE

SWORN TO AND SUBSCRIBED
BEFORE ME ON THIS THE
14th DAY OF MARCH,
1984.

NOTARY PUBLIC, STATE AT LARGE

APPENDIX

Opinion of the Alabama Supreme Court on rehearing, which was rendered on December 9, 1983; (Exhibit A)

Alabama Code, (1975) §13-11-1, et seq., (repealed); (Exhibit B)

Alabama Code, (1975) §13-1-70,73,74. (Exhibit C)

United States Constitution, Articles V, VI, VIII, XIV, Section 1. (Exhibit D)

THE STATE OF ALABAMA----------JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1983-1984

Ex parte: Phillip Wayne Tomlin

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Phillip Wayne Tomlin

79-288 v.

State of Alabama)

ON APPLICATION FOR REHEARING

FAULKNER, JUSTICE

Phillip Wayne Tomlin was convicted under Alabama's 1975 death penalty statute of first degree murder wherein two or more people are intentionally killed by on or a series of acts and of first degree murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire. Sections 13-11-2 (a)(10) and (7), Code of Alabama (1975) (repealed). The trial court held a sentencing hearing and entered an order setting out its findings as to aggravating and mitigating circumstance and sentencing the defendant to death. On appeal the Court of Criminal Appeals

affirmed the defendant's conviction, but found the trial court's sentencing order defective in several aspects. It entered an order remanding the cause with instructions to the trial court to amend its sentencing order to comply with the Court of Criminal Appeals' decision.

While Tomlin's petition for writ of certiorari was pending before this court, the United States Supreme Court handed down Beck v. Alabama, 447 U.S. 625 (1980), in which it found Alabama's 1975 death penalty statute defective because the preclusion clause in the act prohibited juries from considering any lesser-included offenses. Because we interpreted Beck v. Alabama to require that all defendants theretofore convicted under that statute be granted new trials, we entered an order reversing Tomlin's conviction.

The State filed an application for rehearing in which it asked us to reconsider our interpretation of Beck v. Alabama. While the application for rehearing was pending, the Supreme Court released its opinion in Hopper v. Evans, 456 U.S. 605 (1982). Evans had

been convicted and sentenced to death after testifying that he intentionally shot the proprietor of a pawnshop during a robbery. Because Evans suggested no plausible claim not contradicted by his own testimony at trial which would entitle him to a jury instruction on a lesser-included offense, the Court ruled that he had not been prejudiced by the preclusion clause. It concluded, therefore, that Evans was not entitled to a new trial. Hopper, supra, 456 U.S. at 613-14. We hereby withdraw our previous opinion in this case in order to enter an order in accordance with Hopper and its progeny.

A defendant convicted under §13-11-2 of the 1975 statute is entitled to a new trial because of the preclusion clause in the statute if there was evidence introduced at trial which would have warranted a jury instruction on a lesser-included offense or if the defendant suggests any plausible claim not contradicted by his own testimony which he might conceivably have made which would have entitled him to a jury instruction on a lesser-included offense. Cook v. State, 431 So.

2d 1322, 1324, (Ala. 1983)

Tomlin testified that he was in Texas at the time of the killings. We examined in Cook v. State, supra, the effect of an alibi defense on the question of whether a defendant convicted under the 1975 death penalty statute is entitled to a new trial because of the preclusion clause. We concluded that when a defendant testified that he was in a distant location when the crime was committed, his own testimony directly contradicted any evidence he might have introduced to show that he was guilty of a lesser-included offense. Cook, supra, at 1325.

Cook is clearly controlling here. The petitioner argued that, but for the preclusion clause, he might have introduced evidence that Daniels, who was allegedly with Tomlin at the time in question, did the killing, or that Tomlin intentionally killed only one of the victims, or that Tomlin was under the influence of drugs at the time of the killings. All of the claims suggested by the petitioner are, however, in conflict with Tomlin's own testimony. Tomlin is not,

therefore, entitled to a new trial based on the presence of the preclusion clause in the statute.

Tomlin raised the following additional issues in his petition for writ of certiorari:

(1) Whether counts one and three of the indictment were defective;

(2) Whether the trial court should have refused to allow the State to call a witness omitted from a list of potential witnesses supplied by the State;

(3) Whether the trial court should have granted a motion to exclude as to count two of the indictment which charged the defendant with murder for pecuniary or other valuable consideration or pursuant to a contract or for hire;

(4) Whether the jury charge was sufficient;

(5) Whether the verdict form was sufficient;

(6) Whether the trial court properly responded to questions from the jury as to what would happen in the event of a hung jury.

I

SUFFICIENCY OF COUNTS ONE AND THREE

OF THE INDICTMENT

Tomlin did not file his demurrer to the indictment until after the jury was empaneled. By appearing and entering a plea at his arraignment, the petitioner waived any irregularities in the indictment unless the indictment was so defective that it left the accused unaware of the nature and cause of the charges against him. Canada v. State, 421 So. 2d 140, 145 (Ala. Crim. App. 1982)

Omitting the formal parts of the indictment, count one charges that Tomlin:

> "... did unlawfully, and with malice aforethought kill Richard Brune and Cheryl Moore by, to-wit: on January 2, 1977, at a location on or near Interstate 10 in Mobile County, Alabama, was shot with a gun, (sic) in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama."

Petitioner's contention that count one charged no more than first degree murder of two persons is not

well taken. The capital murder statute does require that the victim be killed by "one or a serioes of acts," an allegation omitted from count one of the indictment. The omission did not, however, leave the defendant unaware of the nature and cause of the charge against him in light of the reference to the death penalty statute by act number in each count of the indictment.

Count three alleged, in pertinent part, that Tomlin:

> "...did unlawfully intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j) and Act Number 213, Section 6, Sub-Section H (Act #213, §6(h), Acts of Alabama, Regular Session 1975, in that said killings were especially heinous, atrocious or cruel..."

Count three was, if anything, overinclusive. We disagree with petitioner's argument that the State failed to prove that the murders were "especially heinous, atrocious or cruel." The State introduced evidence that Tomlin had planned to kill Ricky Brune for over

nine months. He traveled from Texas to Mobile with a "hit man" for the express purpose of carrying out his plan to kill Brune. Tomlin and Daniels apparently gained entry into the back seat of Brune's car, and then shot not only Brune but also his fifteen-year-old companion in the back with a shotgun and a pistol. We are not inclined to rule as a matter of law that the murders were not especially heinous, atrocious or cruel.

II

FAILURE OF THE STATE TO DISCLOSE THE IDENTITY OF A WITNESS PRIOR TO TRIAL

About nine months prior to the killings, two officers from the Texas Department of Public Safety, operating undercover talked with the petitioner at a night club in Houston, Texas, in connection with an investigation of illegal drug trafficking. During the conversation Tomlin allegedly stated that he intended to go to Alabama to "kill someone." Tomlin was subsequently prosecuted in Texas on a drug charge but was not convicted. His case was nol-prossed after a mistrial.

The trial court in the instant case ordered the State to submit to the defendant list of the witnesses it intended to call at trial. The list included one of the two Texas police officers. At trial the State called both officers, who testified to their conversation with Tomlin. Petitioner objected to the testimony of the unlisted witness, Officer Hebison. On appeal he argued that, had he known Hebison was going to testify, he would have acquired a transcript of the Texas proceedings in order to facilitate his cross-examination of Hebison.

We fail to see how inclusion of both officers' names would have provided any better notice of the need to obtain the Texas transcript than was afforded by the inclusion of one of their names. Both testified to substantially the same facts. If, indeed, there was any error, it was harmless. A.R.A.P. 45.

III

WHETHER A MOTION TO EXCLUDE SHOULD HAVE BEEN GRANTED AS TO COUNT TWO

Count two charged that the killings were done for

pecuniary or other valuable consideration or pursuant to a contract or for hire, in violation of §13-11-2(a)(7), Code of Alabama (1975) (repealed). The trial court submitted all three counts to the jury, which returned a verdict of guilty "as charged in the indictment." The jury, therefore, convicted Tomlin of every crime included in the indictment, including murder pursuant to a contract or for hire.

The Court of Criminal Appeals affirmed, based on the evidence that Tomlin was accompanied by Daniels, whom he introduced as a "hit man." Even though Tomlin did not himself act pursuant to a contract or for hire, there was sufficient evidence to convict him because under Alabama's accomplice statute all persons concerned in the commission of the crime must be indicted, tried, and punished as principals. Section 13-9-1, Code of Alabama, (1975) (repealed).

The petitioner argued that the court's findings in its sentencing order could not be reconciled with the jury verdict. The court's sentencing order states, inter alia, that "the capital felony was not committed for pecuniary gain" and that "Mr. Tomlin was not an

accomplice... but was in fact a principal who was present and assisted in the commission of the double homicide."

The finding that Tomlin did not act for pecuniary gain was not at odds with the theory that he hired Daniels as his "hit man" and was, therefore, liable as Daniels's accomplice. The court's finding that Tomlin was not an accomplice but was present and assisted in the killings is incongruous on its face. If Tomlin assisted Daniels in the killings he was, by definition, Daniels's accomplice. The finding in question was made with reference to §13-11-7(4), Code of Alabama (1975) (repealed), which provides that it is a mitigating circumstance to be considered in sentencing the defendant if the defendant was an accomplice whose participation was relatively minor. The court was apparently attempting to state that Tomlin was not an accomplice whose participation was relatively minor, but simply omitted that crucial language. At any rate, the issue is moot. The Court of Criminal Appeals ruled that the finding in question

was"defective" and ordered that the cause be remanded for a correction of the sentencing order. Objections based on the content of the sentencing order should be raised after remandment.

IV

SUFFICIENCY OF THE JURY CHARGES

On appeal petitioner argued, for the first time, that the elements of premeditation, unlawfulness, and malice aforethought should have been included in the charge. Failure to include these elements, he argued, constituted plain error which affected his substantial rights. A.R.A.P. 39(k).

We disagree. The oral charge must be judged within the context of the facts in dispute. VanAntwerp v. State, 358 So. 2d 782, 786 (Ala. Crim. App.), cert. denied, 358 So. 2d 791 (Ala. 1978) There was no dispute as to whether the killings were premeditated, unlawful, and done with malice aforethought. Tomlin either carried out the brutal, execution-style killings after months of planning or he was in Texas at the time of the killings and had no knowledge of them. There was

no evidence to suggest accident, passion, justification, or provocation.

V

SUFFICIENCY OF THE VERDICT FORM

Although he did not object to the verdict form which was offered to the jury, petitioner now argues that there was a fatal variance between the indictment and the jury verdict, which read:

> "We, the jury, find the defendant guilty of murder as charged in the indictment and fix the punishment at death."

The same argument with regard to a verdict form which was virtually identical to the one in the case at bar was rejected in Johnson v. State, 399 So. 2d 859, 865 (Ala. Crim. App.), affirmed in part, reversed in part on other grounds, 399 So. 2d 873 (Ala. 1979) That case is controlling.

VI

THE COURT'S INSTRUCTIONS REGARDING A MISTRIAL

After the jurors had deliberated some four hours, they returned with several questions, the second of which was:

"What happens if there is a hung jury?"

The Court replied:

> "Well, I'm going to answer your first question first--I mean your second question first. Under our legal system in the event that you people cannot reach a unanimous verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same charge that you heard and then it would be submitted to that jury. Okay?"

Although he did not object at trial, the petitioner argued on appeal that it was plain error for the court not to instruct the jury of the possibility that Tomlin could have been reindicted and tried for non-capital murder.

It is true that the option mentioned by the petitioner would have been open to the State in the event of a mistrial. For that matter, the State could have dropped all charges against the defendant. Looking at the instruction from Tomlin's vantage point when the question was asked, an instruction which fully set out all alternatives open to the

State, including the State's option to nol-pros the case, would have been as likely to harm as to benefit the defendant. Petitioner cannot, after waiving his objection at trial, bring the matter up on appeal.

The decision of the Court of Criminal Appeals is hereby affirmed.

APPLICATION GRANTED; OPINION OF AUGUST 28, 1981 WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED

Torbert, C.J., Maddox, Jones, Shores, Embry, Beatty and

Adams, JJ., concur.

Almon, J., not sitting.

§13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, §1.)

§13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such

girl in an attempt to have carnal knowledge when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child

under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration

for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first degree or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment

of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, §2.)

§13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence, right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at

death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, §3.)

§13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence

of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, §4.)

§13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, §5.)

§13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed

while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, §6).

§13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, §7)

§13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, §8)

§13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10).

§13-1-70. Degrees of murder.

Every homicide perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary, or death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree. (Code 1852, §111; Code 1867, §3653; Code 1876, §4295; Code 1886, §3725; Code

1896, §4854; Code 1907, §7084, Code 1923, §4454; Code 1940, T. 14, 314.)

§13-1-73. Jury to find degree.

When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. (Code 1852, §115)

§13-1-74. Punishment-Generally.

Any person who is guilty of murder in the first degree shall, on conviction, suffer imprisonment in the penitentiary for life, unless otherwise specified by law; and any person who is guilty of murder in the second degree shall, on conviction, be imprisoned in the penitentiary for not less than 10

years, at the discretion of the jury. (Code 1852, §112; Code 1867, §3654; Code 1876, §4296; Code 1886, §3729; Code 1896, §4858; Code 1907, §7088; Code 1923, §4458; Code 1940, T. 14, 318.)

UNITED STATES CONSTITUTION
ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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